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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 996

PSG Co., a corporation, and PHILIP S. GREENBERG,
Petitioners,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

STATEMENT OF THE CASE

Respondent ("Merrill Lynch") deems the statement of the case by petitioners ("Greenberg") to be inaccurate and incomplete and the brief of Greenberg to improperly argue the merits, rather than to present the legal questions as required when seeking a writ of certiorari from this court. Merrill Lynch is compelled, therefore, to make the following statement:

A. In the Trial Court

This is an action for breach of an alleged contract to accept Greenberg's orders to purchase or sell commodity futures contracts, on margin, up to a

maximum of 300 "open" contracts. (R. 61, 62)[1] Greenberg claimed that by reason of Merrill Lynch's refusal to accept orders for new transactions, he was prevented from making profits on the transactions, and that Merrill Lynch's conduct in terminating the agreement was such as to entitle him to recover exemplary damages. (R. 62)

Nineteen months after the action had been filed, and little more than a month before the date set for trial, Greenberg moved to amend his complaint to assert alleged violations of the Robinson-Patman Act, 15 USC, Sec. 13(c). (R. 450) At the same time, Greenberg filed numerous and complex interrogatories directed at such issues. (R. 437-449)

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1. At this late stage, it should be clear that this is an action for breach of an express contract, and not for vague "wrongs committed" on commodity futures transactions, as Greenberg states in his petition. (Greenberg's Petition, p. 3)

The trial court denied Greenberg's motion to amend on the ground that the new claim Greenberg sought to include by amendment would greatly complicate the issues, that it constituted a separate claim not related to the issues to be tried, that Greenberg proposed to initiate extensive discovery on the new claim at a late stage in the course of the proceedings, and that the late amendment and discovery proceedings would require a postponement of trial, which in turn would require postponement of another major case already scheduled for trial in which Greenberg was a defendant. (Pretrial Tr. 26-28, 46-48)

At trial, the court granted Merrill Lynch's motion to dismiss on the ground that there had been no probative evidences adduced of breach of any agreement, and further that the evidence of damages based on loss of future profits was purely speculative.

B. In the Court of Appeals

As Merrill Lynch reads the decision, the United States Court of Appeals for the Ninth Circuit affirmed the trial court's ruling that Merrill Lynch had no continuing obligation to act as broker for Greenberg in the purchase of new commodity contracts not already held in his margin account; but ruled that Merrill Lynch had an obligation to act as broker in the disposal or "liquidation" of contracts presently held in Greenberg's account. However, the Court of Appeals affirmed the trial court's ruling that the evidence that Greenberg had suffered any damage was speculative and insufficient to require submission of the case to the jury, in that there was no evidence introduced to show that Greenberg actually lost profits or that liquidation of his contracts resulted in a loss. The Court of Appeals

refused rehearing on a petition devoted solely to the question whether the damages Greenberg had sought to recover were speculative.

II

ARGUMENT

CERTIORARI SHOULD NOT ISSUE IN THIS CASE BECAUSE THERE ARE NO SUBSTANTIAL QUESTIONS PRESENTED FOR REVIEW

A. Greenberg's petition seeks to obtain further review of a question of fact.

A review of a decision of a court of appeals on writ of certiorari will be granted only where the petitioner shows that there are important questions of law presented, involving a conflict between the decision of the court of appeals and this court, or other circuit courts of appeal.

Rule 19, Rules of the Supreme Court of the United States

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial

discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * *

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Greenberg's petition presents no issue within the guidelines of Rule 19 for consideration by this court. The trial court ruled that the evidence Greenberg

presented in support of his claim for damages for lost profits was speculative and insufficient to raise a question for the jury. The Court of Appeals affirmed on that ground, and denied a petition for rehearing on that issue.

This court, as a court of law rather than a court for the correction of errors in fact finding, will not undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

> Graver Tank & Mfg. Co. v. Linde Air Prod. Co. (1949) 336 US 271, 93 L ed 672 (adhered to on rehearing, 339 US 605, 94 L ed 1097)
>
> Berenyi v. Immigration Service (1967) 385 US 630, 17 L ed 2nd 656, 661

For the same reason, this court will not undertake to review concurrent rulings by the two courts below that the evidence was insufficient to present a jury question.

Houston Oil Co. v.
Goodrich (1918)
245 US 440, 62 L ed 385

Greenberg argues in his petition that the Court of Appeals decided a question of law in conflict with decisions of other federal courts. In furtherance of the argument, he cites one case from this court and one case from each of the eleven courts of appeal wherein it was held, under the fact situation presented in the particular case, that the evidence of damages was not too speculative to prevent submission of the case to the jury. None of the cases cited involve a claim for damages for breach of a contract to purchase or sell stocks or commodities contracts. Instead, they involve such diverse subject matter as antitrust proceedings, claims for wrongful death, fraud and other tort claims. Further, none of the cases cited enunciate a rule of law different from that

relied upon by the two courts below in this case, but simply hold that, under the particular facts presented, the evidence was not too speculative.

The fallacy in the argument that the decision in this case is in conflict with the decisions of other federal courts on a point of law is pointed up by the fact that cases can be found from each circuit holding that, under the evidence presented in the particular case, there was insufficient evidence to require submission of the case to the jury.[2] Thus,

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2. See, e.g., James Wood General Trading Establishment v. Coe (2d Cir 1961) 297 F2d 651; Washington Sand & Gravel Co. v. Brann & Stuart Co. (3d Cir 1947) 162 F2d 826; Polar Steamship Corp. v. Inland Overseas S. Corp. (4th Cir 1943) 136 F2d 835, cert. denied, 320 US 774; Camilla Cotton Oil Co. v. Spencer Kellogg and Sons (5th Cir 1958) 257 F2d 162; Baumer v. Franklin County Distilling Co. (6th Cir 1943) 135 F2d 384, cert. denied, 320 US 750; Classic Bowl, Inc. v. A M F Pinspotters, Inc. (7th Cir 1968) 403 F2d 463; Terre Haute Brewing Co. v. Dwyer (8th Cir 1940) 116 F2d 239; Putnam v. Lower (9th Cir 1956) 236 F2d 561. For another recent Oregon decision, see DeCicco v. Uniroyal, Inc. (D.Or.1968) 293 F Supp 1190.

it is clear that whether the evidence of damages is too speculative to require submission of the case to the jury is a question of sufficiency of the evidence to be determined in each individual case.

Among the decisions from other courts of appeal holding that evidence of damages was too speculative is

James Wood General Trading Establishment v. Coe (2d Cir. 1961) 297 F2d 651

which is relied on, among other authorities, by the Court of Appeals in the instant case.3 In the James Wood case, a customer brought an action against stockbrokers for alleged breach of contract to sell a particular stock when the price went above $58 per share. On the question of damages, the court remarked (p. 658):

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3. Greenberg had relied on the trial court's decision in the James Wood case in his briefs in the Court of Appeals, but had neglected to inform the Court of Appeals that the case had been reversed on appeal. The Court of Appeals pointed this matter out in footnote 9 of its opinion.

"However, even assuming Moretti had forgotten the instructions as given, and that he exercised no discretion whatever, it is difficult to find in this record any evidence of damage. What proof can there be that, if Moretti had not forgotten the instructions, he would have sold the stock on July 25 or 26, 1957, at 58 1/8 or any other price? How can such a conclusion be arrived at other than by the merest guesswork and speculation? The plain fact is that, in the circumstances of this case there is and can be no evidence of any probative value to support a finding that he would have sold. On the contrary, there is substantial evidence to support an inference that he would not have sold the B & O at the prices prevailing in the market on July 25 and 26, 1957.

"Damages cannot be based on speculation. The difficulty of measuring and appraising the amount, once it is clear that actual damage has been sustained, is another matter. Where, as here, the existence of any damage whatever would have to be a matter of guesswork, no recovery is allowed (citations omitted).

"Where actual damage depends on an exercise of discretion, and there is no evidence from which it can reasonably be determined how such discretion would be exercised, no damages are recoverable (citations omitted)."

The law of Oregon also is to the effect that damages cannot be based on speculation.

Weaver v. Austin (1948)
184 Or 586, 601, 200 P2d 593

Western Rebuilders, Inc. v.
Felmley (1964) 237 Or 191,
203, 386 P2d 813, 391 P2d 383

In summary, a writ of certiorari should not issue in this case, because the question presented for consideration is the correctness of the trial court's ruling on a question of sufficiency of evidence, and not a question of law. That ruling was affirmed on appeal and on petition for rehearing. Greenberg has had his day in court, and the Court of Appeals, which is the court designed to review allegations of error as to determinations of fact, has upheld the trial court. This court's time should not be taken up with further arguments as to the sufficiency of the evidence.

B. The decisions of the two courts below are correct.

The question presented by Greenberg's petition for writ of certiorari is whether there was sufficient evidence to require submission of this case to the jury. Apart from the question whether the case involves legal issues of a kind this court should review, it is clear that the two lower courts were correct.

Greenberg asserts that in commodity futures transactions, where because of market action the value of the contracts held by the broker for a customer increases over margin requirements, the excess may be withdrawn by the customer; that, had Merrill Lynch accepted Greenberg's orders, the value of the contracts at a given date selected by Greenberg would have exceeded the required margin; and that the excess "cash" Greenberg was "entitled to withdraw" from his accounts constituted profits

Greenberg lost when Merrill Lynch refused to accept his orders.

The error in Greenberg's argument is apparent when all the facts concerning obligations between broker and customer are considered. A broker's customer is entitled to withdraw money from his account when it becomes "overmargined" by appreciation of the value of the contracts. He is also required, however, to put up or pay to the broker additional money when his account is "undermargined." Because the market fluctuates constantly, it is impossible to determine whether a profit or loss has ultimately been made on the purchase of a commodity contract until the contract has been disposed of and it has been determined whether customer withdrawals exceeded amounts required to maintain margin. Thus, until the transaction has been completely closed out by sale of the commodity con-

tract, the question whether its purchase would have been profitable is necessarily based on speculation. There can be no "profit" on a transaction until a final sale is made, and Greenberg did not claim he would have sold the contracts in question on the date chosen for valuation. If Greenberg had not made a sale or disposal of the contract, of course, the temporary paper profit never would have been realized, and if not realized by a sale would have disappeared immediately as the market began to swing against Greenberg. The fact is, as the court below noted, Greenberg arbitrarily selected the one day on which the contracts showed a paper appreciation as the date to "value" the contracts. (Tr. 270) Valuation on other dates would have shown a loss.

In this connection it is important to note that there was no evidence that

Greenberg would have suffered any loss if he had later actually replaced his orders for the same contracts with his new broker, because there was no evidence that the contracts were not available at the same prices at a later date. In fact, Greenberg could have purchased the same contracts through his new broker at a more favorable price, because, as mentioned above, the market immediately turned and dropped below the prices at which he claimed he should have been able to purchase the contracts through Merrill Lynch. (Ex. 180)

Damages for lost profits are ordinarily shown by evidence of profitable past operations.

> Mercury Cleaning Systems v. Manitowoc Eng. Corp. (7th Cir 1958) 255 F2d 318

In the instant case, Greenberg had steadily lost money, and could not provide such evidence. The new theory of damages he sought

to assert in place of evidence of profitable operation was without rational or factual justification, and the two courts below properly held that the case should not be submitted to a jury.

C. The trial court's order striking Greenberg's claim for exemplary damages does not present a ground for reversal.

During the course of trial, the court withdrew Greenberg's claim for exemplary damages from the case.

The trial court believed that there was no evidence presented or to be presented in this case of malicious conduct attending the alleged breach of contract which could provide a basis for an award of exemplary damages. (Tr. 107-113)

The court's ruling was based on Oregon law that exemplary damages may not be awarded for breach of contract. See,

Weaver v. Austin
(1948) 184 Or 586,
200 P2d 593

Smith v. Abel et al
(1957) 211 Or 571,
316 P2d 793

The Court of Appeals affirmed the trial court's ruling on the ground that Oregon law requires that there be an award of actual damages before exemplary damages can be recovered, and exemplary damages cannot constitute the basis for a cause of action. See,

Martin v. Cambas
(1930) 130 Or 257,
293 P 601

Weaver v. Austin
(1948) 184 Or 586,
200 P2d 593

As Greenberg failed to prove any actual damages, the issue as to exemplary damages is moot.

In his argument in this court, Greenberg concedes that it is the law in Oregon that exemplary damages may not be awarded where there are no actual damages.

As Greenberg's claim for exemplary damages presents no ground for reversal, it need not be considered by this court as ground for review on petition for writ of certiorari.

D. The trial court correctly denied Greenberg's motion to amend the pleadings to add a new and unrelated cause of action.

In August, 1967, 19 months after the case had been filed and a little more than a month before the date set for trial, Greenberg moved to amend his complaint to assert alleged violations of the Robinson-Patman Act, 15 USC, Sec. 13(c). (Record 450) At the same time, Greenberg filed numerous interrogatories. (Record 437-449) The trial court denied the motion to amend, for the reasons stated at pages 2-3 of this brief.

The Court of Appeals affirmed the action of the trial court on the ground that it is not an abuse of discretion to

refuse a late motion to amend, where such motion would introduce an entirely new and different cause of action, involving complicated legal and factual issues, and require extensive discovery and preparation for trial.

The allowance of a motion to amend is discretionary and the trial court clearly did not abuse its discretion in this case. In the cases where the trial court's denial of a motion to amend has been held to be an abuse of discretion, the proposed amendment merely stated an alternative theory, based on the same operative facts, or added some fact necessary to state a complete cause of action. In most of the cases, the complaint had been dismissed for failure to state a claim on which relief could be granted and the plaintiff would have been out of court if the amendment had not been allowed. Thus, the trial court's refusal to allow an amendment to cure an imperfectly

stated claim where a genuine claim exists may legitimately be considered an abuse of discretion and require reversal because the plaintiff is left without remedy. None of those circumstances are present in the instant case, as the new amendment did not seek to cure or add to the old claim, but constituted a new and independent claim. See,

> Suehle v. Markem Machine Company (ED Pa. 1965) 38 FRD 69
>
> Portsmouth Baseball Corp. v. Frick (SDNY 1958) 21 FRD 318

Even assuming, arguendo, that the trial court erred in refusing to allow Greenberg to amend, the error would not have been prejudicial and would not constitute a ground for reversal. In the instant case, Greenberg's new claim involved an entirely new set of operative facts and a new theory of law. The new claim consequently could be asserted in an independent

action, and could not be barred by the trial court's refusal to allow amendment, as the trial court's decision on the original claim would have no res judicata effect. As the new Robinson-Patman Act claim did not affect the merits of the original contract claim, the trial court's decision on the merits of the contract claim cannot be reversed and remanded to the trial court. Further, it is not necessary to reverse and remand this case to the trial court for determination of the Robinson-Patman claim alone, because Greenberg has always been able to assert that claim by commencing a new action. Thus, Greenberg has not been injured in any way by the trial court's denial of the motion to amend.

As a side issue, Greenberg contends that Merrill Lynch resisted discovery proceedings so extraordinarily that Greenberg could have raised the new issues

sooner. (Greenberg's petition pages 12, 13) This argument was urged at both the trial court level and on appeal, and was not found to have any basis in fact.

III

CONCLUSION

Merrill Lynch respectfully submits that Greenberg's petition for writ of certiorari should be denied, in that:

1. Greenberg's petition requests a review of the decisions of the two courts below on an issue of fact, not law, and this court, as a court of law, will not undertake to review concurrent findings of fact by the two courts below.

2. Greenberg's argument with respect to exemplary damages and denial of

motion to amend does not present any ground for reversal.

Respectfully submitted,

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